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Secrets. II.—27—100,000—21-5-23.

1922

Revenue (~~195~~) Department.

SERIES.

G.O. No. 767—8

Confidential

Dated 25-4-22 April 1922.

122 (C)

[Despatch Abstract.]

S Kanara — Kumari Lands — Govt. right — High Court Appeal No. 2252/17, Privy Council appeal — Statement of law & facts forwarded to India Office

Confidential.

Government of Madras

REVENUE DEPARTMENT

G.O. No. 767, 25th April 1922

Suits

(South Kanara) Kumari lands—Government right—High Court Second Appeal No. 2252 of 1917—Privy Council appeal—Statement of law and facts—Forwarded to India Office.

READ—the following paper:—

G.O. No. 1118, Revenue, dated 17th May 1920.

Order—No. 767, Revenue, dated 25th April 1922

The statement of law and facts together with the printed record in respect of the appeal to the Privy Council, against the decision of the High Court, Madras, in Second Appeal No. 2252 of 1917 will be forwarded to the India Office.

Miscellaneous

2. The Government sanction the payment to the Government Pleader, Madras, of a fee of Rs. 1,000 for the preparation of the statement.

(By order of the Governor in Council)

E. W. LEGH,
Acting Secretary to Government.

To the Government Pleader, Madras, with copy of letter.
,, Accountant-General.
,, Finance Department.
,, Board of Revenue (Land Revenue and Settlement) with copy of letter.

GOVERNMENT OF MADRAS

REVENUE DEPARTMENT

No. 768.

From

E. W. LEGH, Esq., I.C.S.,

Acting Secretary to the Government of Madras,

Revenue Department.

To

THE LEGAL ADVISER,

INDIA OFFICE, WHITEHALL,

London.

Dated Fort St. George, the 25th April 1922.

SIR,

[Suits—(South Kanara, Madras Presidency)—Kumari lands—High Court Second Appeal No. 2252 of 1917—Privy Council appeal—Letter from the India Office, Legal Adviser's Department, dated 15th February 1922.]

I am directed to forward six copies of the statement of law and facts together with six copies of the printed record (two volumes) in respect of the appeal to the Privy Council against the decision of the High Court, Madras, in Second Appeal No. 2252 of 1917.

Miscellaneous.

I have the honour to be,

Sir,

Your most obedient servant,

E. W. LEGH,

Acting Secretary to Government.

ANNEXURE

Statement of law and facts for the information of Counsel for Government in England in appeal to Privy Council against Second Appeal No. 2252/1917 of High Court, Madras.

The suit out of which this appeal to the Privy Council arises is brought by the plaintiff as Karnavan and Manager of his tarwad against the Secretary of State for India in Council, and relates to fifteen items of Kumries situated in Panathadi and Bedadka villages of the Kasaragod Taluk (formerly Bekal Taluk) in the South Kanara District and lying to the south of the Chandragiri river. "Kumri" is defined to be "a cultivation of land outside a warg by felling and burning a portion of the forest, the ashes acting as manure. After one or two crops are raised, the plot is abandoned and a fresh patch treated in the same way" (see 28 Mad. 257 at p. 270; see also paragraph 1 of Government Order, dated 23rd May, 1860 exhibit XIV). It is therefore a portion of the forest land.

The plaintiff says that all the plaint Kumries belong to his tarwad: (a) some as portions of his ancient muli wargs, (b) some on right of purchase from their original proprietors, (c) some though acquired in the first instance on mortgages from the previous wargdars, belong to his tarwad on Muli right acquired by prescription, and (d) some on mortgage right (vide paragraph 5 of plaint).

In paragraphs 6 and 8 of the plaint, it is also the plaintiff's case that the plaint Kumries have been in the exclusive possession and enjoyment of this tarwad for more than a century on their own proprietary or warg right, and by reason of such adverse possession, the rights, if any, of Government in the plaint Kumries have been lost. In paragraph 9, plaintiff also alleged that the plaint Kumries having been included in the registers of warg Kumries maintained by the Government and not in the register of Government Kumries, the Government is estopped from claiming the plaint Kumries as belonging to Government.

The plaint recited that at the last settlement the plaint Kumries having been omitted from the pattas granted to the plaintiff's tarwad, the then Karnavan of the plaintiff's tarwad on inquiry came to know that the said Kumries have been treated as Government lands, and repeatedly petitioned the Revenue authorities to include the plaint lands in the pattas of the plaintiff's tarwad, but his request was finally refused on the 3rd May 1911 and 30th June 1911, and that hence this suit for which the cause of action is said to have arisen on 30th June 1911 as stated above.

The plaintiff therefore prayed for a decree against defendant, declaring that the Kumries described in the plaint schedule belong to the plaintiff's tarwad and ordering the issue of pattas to plaintiff for the same. The plaintiff also prayed for a permanent injunction restraining the defendant from dealing with plaint Kumries to the prejudice of the rights and possession of the plaintiff's tarwad.

In his written statement the defendant denied that the plaint Kumries belong to the plaintiff's tarwad as alleged in paragraph 5 of the plaint. The defendant denied all knowledge of the sales and mortgages relied on by plaintiff, and contended that the said transactions, even if true, do not affect defendant's rights as Government was no party to the same. The defendant further denied the exclusive possession and enjoyment set up by plaintiff in paragraph 6, and contended that the alleged possession and enjoyment, even if true, has not been adverse to the rights of Government and that it cannot confer any proprietary or janm right on plaintiff's tarwad. The defendant also alleged that the date of the cause of action is incorrectly stated in the plaint, and contended that the plaint Kumries having been classified as unoccupied assessed Kumries at the time of the survey and settlement, plaintiff's present suit for a declaration after such a long lapse of time is barred by limitation. The defendant most emphatically denied the plaint allegation that the plaint Kumries have been acknowledged by Government to be warg Kumries and put the plaintiff to the strict proof of the said allegation. The defendant alleged that, far from admitting the janm right of the plaintiff in the plaint Kumries, the Government have all along asserted their title and proprietary right to the same by the rules and restrictions laid down in connexion with the Kumri cultivation in the southern magnes of the Kasaragod Taluk. The defendant also alleged that the boundaries of the plaint Kumries have not been given, and that he does not admit the correctness of the names as given in the plaint. The defendant accordingly contended that plaintiff is not entitled to any of the reliefs claimed in the plaint.

Upon the above pleading, the following issues were raised by the trial court:—

I. Whether the plaint Kumries belong to the plaintiff's tarwad on muli or proprietary right as alleged in paragraph 5 of the plaint.

II. Whether plaintiff's tarwad had exclusive possession and enjoyment of the plaint Kumries for more than a century and whether such possession was adverse to Government, and, if so, whether the rights, if any, of Government have been lost as alleged in paragraphs 6 and 8 of the plaint.

III. Whether, as alleged in paragraph 9 of the plaint, the defendant has acknowledged the plaint Kumries to be warg Kumries and included them in the register of warg Kumries, and, if so, whether defendant is now estopped from claiming the plaint Kumries as belonging to Government?

IV. When did the cause of action arise for this suit and whether the plaintiff's suit is barred by limitation as contended by defendant?

V. Whether plaintiff is bound to give the boundaries of the plaint Kumries and whether their description in other particulars is correct.

VI. Whether plaintiff is entitled to the declaration and injunction sought in respect of all or any of the plaint Kumries without impleading the necessary parties.

VII. To what relief, if any, is the plaintiff entitled.

The first court (Subordinate Judge of South Kanara) held on issue I that plaintiff has not produced any mulpattas or title deeds in proof of his allegation that: (a) some of the plaint Kumries are portions of his ancient muli warg, and so far as this part of his case is concerned, plaintiff has not attempted in any way to better his case or attack this finding of the Subordinate Judge in any of the higher Courts. So far as the claim by right of purchase and mortgage was concerned (see (b) to (d) of paragraph 5 of plaint as stated above), plaintiff relied on certain exhibits—especially exhibits A to E, J, K and R to GG. The Subordinate Judge held that none of these documents are admissible in evidence and that the plaintiff has not proved his title to any of the plaint Kumries. Even if they are held to be admissible, he says that they are not inconsistent with the Government ownership of these Kumries and that plaintiff has failed to prove his title even with reference to these documents. He also says that absolutely no documents have been produced by plaintiff in respect of plaint items 2, 9, 10 and 11. On issue II, relating to adverse possession the Subordinate Judge finds in the negative against the plaintiff; on issue III that the Government is not estopped from claiming the plaint Kumries as belonging to Government; on issue IV that plaintiff's suit is barred by limitation under article 120 of the Limitation Act, as having been brought more than six years from the date on which the plaintiff's cause of action accrued to him; on issue V, that plaintiff is bound to give the boundaries correctly of the plaint Kumries; on issue VI that, because the plaintiff admitted that in respect of two Kumries of plaint item 8, the patta has been granted to two other persons, and because it was in evidence that portions of the plaint Kumries have been assessed to certain other persons, and as hence all the persons interested were not on the record, the plaintiff is not entitled to get any declaration in respect of the said Kumries without impleading the other persons also as parties; and on issue VII that plaintiff is not entitled to any relief because of the findings on issues I to IV: and he dismissed the suit with costs.

The District Judge (of South Kanara), on appeal, also agreed with the Subordinate Judge that none of the documents, exhibits A to E, J, K, U to GG, are admissible in evidence (no reference being made to exhibits R, S and T). He also says that no documents whatever have been produced by plaintiff in respect of plaint items 2, 9, 10 and 11. The District Judge concurred with the Subordinate Judge in his findings on issues I to III and dismissed the plaintiff's appeal with costs. He did not consider issues IV to VI at all.

Both in the first court, as well as in the District Court, it was assumed (and the plaintiff did not contest it) that the burden of proving ownership of the plaint lands was on the plaintiff. But when the case came up in second appeal to the High Court, the plaintiff contended that as the suit land, though it is now included in South for purposes of administration, once formed part of the Nair Kingdom and still retains its Nair population and customs, the presumption applicable to the case should be the one prevailing in Malabar, viz., that forest lands are presumed to belong to some private person and not to the Crown (See *Secretary of State* v *Vira Rayan*, 9 Mad. 175; Fifth Report, appendix 30, p. 842, 28 Mad. 257 F. B. at 267) and not the one obtaining in South Kanara that forest and waste lands are presumed to belong to the Government (28 Mad. 257 F. B; 3 Bom. 452). (And probably in the Privy Council, as it appears from ground No. 5 of their memorandum of appeal, he might go further and contend that, even if the presumption to be applied is the one obtaining in South Kanara, that presumption has been wrongly laid down in 28 Mad. 257 F. B. and 3 Bom. 452, and that those decisions are wrong. This he could not have done in the High Court as the 28 Mad. case was a Full Bench decision). The High Court, after going into the history of the suit locality, held that the presumption to be applied is the one laid down in 28 Mad. 257 for South Kanara in general and that the lower appellate court's judgment could not be upset on this ground. It, however, held that of the documents rejected as inadmissible by the lower courts, exhibits C and R are admissible and they must in any case be considered. Seshagiri Ayyar, J., also said that exhibits M and JJ must also be considered (these were not amongst the documents rejected as inadmissible by the lower courts). The High Court also held that the lower appellate court's consideration, especially of issue II, was very perfunctory and that it should be re-considered. It accordingly sent down the case to the lower appellate court for revised findings on all the issues raised by the trial court, authorizing it (lower court), if it thought fit, or if either party requested it to

so, to examine the Commissioner with reference to his plans (which had not been done before) and directing that in other respects the findings must be on the evidence already on record. In view of a further appeal to the Privy Council, the High Court also directed the lower appellate court to give its findings in the alternative that all the documents above referred to are, and are not, admissible

The lower appellate court, conforming to the High Court's directions, and after examining the Commissioner and receiving all his plans also in evidence, submitted revised findings. On issue I, it held that exhibits C, R, M and JJ do not throw any light on the points in question and that plaintiff has not proved his title to any of the items. (But he held that, if all the plaintiff's documents are held to be admissible in evidence, he has proved his title to all the plaint items except a portion of item I. which plaintiff himself admitted was claimed by mistake; item 2 (whole); portion of item 8 (viz. S. 302/A1); item 9 (whole); and portions of items 10 and 11 (viz. plots 351/A17 and 347/A and A1). He also directed that the position of one of the plots in item 1 (viz. S. No. 149/18) as shown in the Commissioner's plan must be modified as its position is not correctly shown in it. He also observes that plaintiff has not produced any documents for items 2, 9 and a portion of item 10 (viz. plot 351/A17) and that for item 11 there are no documents except exhibits L and HH. On issue II he held that the various acts of possession relied on by plaintiff do not constitute adverse possession against Government, nor do they extend up to sixty years prior to the suit, and he records his finding against the plaintiff. On issue III he says it was not even pressed before him and he finds no estoppel proved. On issue IV he held that the plaintiff's suit is barred as having been brought more than six years after he knew that the lands were registered as belonging to Government. On issue V also he records his finding against the plaintiff. On issue VI he held that the plaintiff could not be given a declaration in respect of two out of the seven Kumries of item 8 (viz. S. Nos. 302/A1 and 300/A) without impleading other necessary parties, and that with respect to the rest of the Kumries there is no objection of non-joinder of parties. On issue VII he found that the plaintiff is not entitled to any relief.

The High Court accepted these findings and dismissed the second appeal with costs. The plaintiff has appealed to the Privy Council.

I might at once state that, as this is an appeal to the Privy Council from a second appeal to the High Court, and especially as no special leave to appeal from the decree of the first appellate court has been applied for or granted, the findings of fact by the first appellate court are final and are binding on the Board, so that the appellant should not be allowed to re-open any questions of fact before the Privy Council. In 14 Cal. 740 (P. C.) at p. 748, Their Lordships say " In the present case, there is evidence tending to prove possession by the plaintiff for a considerable period antecedent to February 1873. Whether it is sufficient to establish the plaintiff's possession, and whether, if established, that possession is sufficient to warrant the inference of fact derived from it, are questions upon the merits of the case. The evidence has been disposed of by the court below as a court of appeal, after careful consideration, and upon the merits, his judgment was final in the High Court which was sitting on a second appeal and is final and binding on this Board." In 16 Cal. 753 (P. C.) at pp. 754 to 755, Their Lordships say that as it is an appeal to the Privy Council from a second appeal to the Judicial Commissioner, such appeal would succeed, if at all, only on a question of law. The question involved was one of fact, and after stating that all the three lower courts have decided it one way, they say " The case is not only within the general rule which this committee observe that they will not, unless under very exceptional circumstances, disturb a finding of fact in which the courts below have concurred, but it is within the more stringent rule laid down by the Code of Civil Procedure." Then, after referring to Sections 584 and 585 of the Code of 1882 (corresponding to Sections 100 and 101 of that of 1908) which deal with the grounds on which alone a second appeal would lie, Their Lordships say " The Committee is sitting in appeal from the order of the Judicial Commissioner, and it can only do what the Judicial Commissioner himself could have done. No special leave to appeal from the decree of the Commissioner (the first appellate court) had been applied for, and Their Lordships find that they are bound by his findings of the facts." 18 Cal. 23 (P. C.) is yet another authority for the same position. It was an appeal to the Privy Council against a decree of the Judicial Commissioner of the Central Provinces, affirming a decree of the Commissioner (lower appellate court). It came before the Board with the usual certificate from the Judicial Commissioner to the effect that it involves a substantial question of law. The second appeal depended entirely on issues of fact. The facts of the case and the judgment of the Commissioner (lower appellate court) showed that he did not give the proper weight to the several pieces of evidence in the case and Their Lordships expressed regret that the Commissioner should have dealt with the matters before him in so meagre a fashion. Reference was made to 9 Cal. 309 and 7 All. 649 (F. B.) which held that misapprehension of the evidence and a consequent erroneous finding of fact by the lower appellate court might be treated as an error or defect in procedure within the meaning of Section 584, and it was sought to be argued before Their Lordships, on the basis of these decisions, that it was open to the Judicial Commissioner and therefore open to Their Lordships to

despite plaintiffs' contest, got the order in their favour. Thereupon plaintiffs brought this suit. Held that whatever cause of action plaintiffs might have had before the proceedings of 1910, the order passed in those proceedings gave them a fresh cause of action and their suit was not barred. They say that the only point decided in 20 All. 35 (F.B.) was that Article 120 is applicable to a suit of this nature and that the period is six years from the date on which the cause of action arises. They refer, with approval, to the unreported All. Case 279/1908 (see above under 10 A.L.J. 413), 31 All 10 (note), and 10 A.L.J. 413) and distinguish 31 All. 9 by saying that there the objection of the defendant to the correction of the Khewat was not considered to give a fresh cause of action.

31 *All.* 10 (*note*) (*S.A.* 268/1907 (Knox and Aikman, JJ.)—Defendant got his name entered in Khewat, in spite of appellant's objection, in May 1899. Defendant in May 1903, brought a suit for profits of the share in respect of which his name was entered. Plaintiff sued in July 1905 for declaration of his right. Held, he is not barred. The Court says that the plaintiff might have brought a suit for declaration upon the order of the Settlement Officer of May 1899, but he was not bound to do so. Defendant might have taken no steps to enforce any right under the order of May 1899, but when he did so, plaintiff got a fresh cause of action for asking for a declaratory decree. They also say that the suit before them is in reality one within the last paragraph of section 201 of the Agra Tenancy Act. (This was distinguished in 31 All 9.)

11 *A.L.J.* 877 (Piggot, J.).—The first entry was 28 years before suit and it was continued at revision of Settlement. Within six years of suit defendant transferred the land to *S*, who sued plaintiff profit. Held, that such transfer and suit constituted a fresh cause of action and that the suit was not barred. The Court says that though plaintiff did not think it worth while to take any action on a previous slander of title by the same defendant more than six years before suit, he can avail himself of a fresh cause of action which accrues to him. And he says that the decision in 31 All. 9 is not against this position at all, but really in favour of it.

41 *All.* 509 (Piggott and Walsh, JJ.)—The entry was of 1887 and that to the knowledge of the litigants in this case or their predecessors in title. In 1914 defendants applied for partition. Plaintiff objected, but was referred to the Civil Court. Held, the suit is not barred. Piggott, J, says the case is not free from difficulty and thinks that 31 All. 9 is some authority against the position he is taking. He says he sticks to his view in 11 A.L.J. 877 and that his view is also in accordance with 36 All. 492. His view, he says, is that the proceedings in the partition court, whereby plaintiffs found themselves for the first time in danger of being actually dispossessed of their joint ownership, gave rise to a fresh cause of action altogether independent of any cause of action which may have been furnished to the plaintiffs by the settlement entry in 1887. (How this is against the position taken in 36 All. 9 one fails to see, for there the decision was expressly based on the ground that there was no fresh cause of action, but only a continuation of the original cause of action.)

14 *A.L.J.* 233 (Mears, C.J. and Banerji, J.).—Wrong entry in Khewat was made in 1901, by reason of a mistake in a decree obtained by defendant against plaintiff. In 1905 defendant sued plaintiff for profits. The suit failed, and on plaintiff's application the mistake in the original decree was rectified and plaintiff got formal possession in February 1910. He applied for correction of Khewat, but was refused in July 1910 and was referred to the civil court. In 1917 defendant applied for partition. Plaintiff objected and was referred to the civil court. He filed the present suit. Held, he is not barred. Plaintiff's position in 1910 was that he was in actual possession and had behind him the duly corrected decree of the civil court and so there was no need for him to embark on litigation, but in 1917 that position was materially altered because by the partition suit there was a fresh attack on his title which gave him a fresh cause of action which could not be said in any way a continuation of the original cause of action and the two matters, that of 1910 and of 1917, were separate and distinct. It was on this ground that they distinguished 31 All. 9, and they said that the principle which should govern the case before them was that laid down in 36 All 492.

3 *Pat. L. J.* 361 (Miller, C.J. and Mullick, J.)—Here also it was a case of a fresh invasion of the plaintiff's right. There were two finally published records of right. Held, that though plaintiff might be barred from seeking any relief so far as the first records was concerned, he could sue in respect of the second record within six years of such second record. 31 All. 9 was distinguished on the ground that the plaintiff's subsequent failure to get the entry corrected did not constitute a fresh invasion of his right, whereas that was not the case in the case before them.

36 *Mad.* 305 (Benson and Spencer, J.J.)—Plaintiff's land was attached as if it belonged to another. It was subsequently sold in pursuance of that attachment. Plaintiff sued within six years of sale, but more than six years after the attachment. Held, the sale was a fresh and greater invasion of his right and hence gave him a fresh cause of action, and that he is not barred. It was said following 31 All. 10 (note) that though he might have sued after the attachment he was not bound to do so. (This case was dissented from in (1914) M.W.N. 197).

41 *I.C.* 199 (*Patna*)—(Sharfuddin and Roe, J.J.)—Here also a fresh challenge to plaintiff's title (defendant suing plaintiff for profits) was held to give plaintiff a fresh cause of action.

23 *C.W.N.* '883 (Chatterjea and Newbold, JJ.)—It was held that the time begins to run from the 16th December 1907, the date of the final publication of the record of rights, and not from 6th January 1908, the date of the certificate of final publication of the records; for, "though the certificate signed by the Revenue Officer is the conclusive evidence of publication, yet the presumption as to the correctness of the entry arises from the publication, and so the time runs from such earlier date."

19 *Bom.* 43 (Sargent, C.J. and Candy, J.)—Plaintiffs having purchased certain lands in 1867 brought this suit for a declaration of their preferential right (as between themselves and another person *P*) to have the land registered in their name in the revenue records. Held, that a right to be placed on the register was not an interest in immoveable property and that Article 144 did not apply. The Judges also said: "It is moreover a right which does not give rise to a cause of action until it is asserted or denied. The question therefore is when the right was disputed from which time the plaintiff would doubtless have only six years to file a suit for a declaratory decree." In the case before them the right had not been asserted or denied until the plaint was instituted and *P*, when made a defendant, did so in his written statement. So the suit was held not barred.

26 *Mad.* 410 (Benson and Bhashyam Ayyangar, JJ)—Both the rival claimants to certain lands attached by a magistrate in 1886 under section 146, Criminal Procedure Code, brought suits in 1897, among other things, to obtain a declaration of title to them as well as to the accumulated income (the magistrate being in possession all along). Held, that so far as this relief was concerned the proper Article was 120 and not 142 or 144, and that the period should be reckoned from the time when the right to sue accrued. And they say at page 416. "The right to sue certainly accrued on the date of the attachment which is rightly given as the date of the cause of action in both suits. The alleged wrongful denial by the defendants in each case of the plaintiff's title and possession and the procuring by such denial of the attachment by the magistrate is the cause of action for the declaratory suit." They held also that there was no "continuing wrong" within the meaning of section 23 of the Limitation Act.

20 *All* 35 (F.B)—Held, that Article 120 and not Article 144 governs such suits. In this case what was disputed was not the starting point of limitation, but the Article applicable. But they also say: "The act of the Settlement Officer, if it was a wrong to plaintiffs, was a wrong committed once for all, and was very properly described as being the cause of action upon which the plaintiffs came into Court."

1 *Pat. L.J.* 73 (Mullick, J.)—In the record of rights, finally published in 1905, the plaintiff was shown as a tenant liable to pay rent to the defendant. The latter obtained a decree for rent against plaintiff in August 1912. In October 1912, plaintiff brought this suit for a declaration that he was a lekhiraj tenant and not liable to pay rent. Held, that the cause of action arose not in August 1912, but in 1905, the final publication of the record of rights.

33 *Mad.* 173 (Munro and Abdur Rahim, JJ.)—They say at page 175 that the classification of lands as nattam porambоke at a settlement in 1874 "was at the utmost an assertion of title and is not by itself sufficient to prove the title of the Government (defendant)." So that they seem to concede that it is, at any rate, an assertion of title.

Other similar cases, not wholly in favour of the Government (including cases against the Government, cases apparently against them but distinguishable, etc):—

10 *A.L.J.* 413 (Chamier, J.)—Settlement was in 1901, plaintiff's objection to the entry was thrown out in November 1901. Plaintiff remained in undisturbed possession and in April 1909 the Collector corrected the entry, but his order was set aside by the Commissioner in August 1909 and thereafter defendants were alleged (though this allegation was not proved) to have interfered with plaintiff's possession. The two questions considered were: (i) whether time began to run against plaintiff in 1901; and if so (ii) whether a fresh cause of action accrued to them in August 1909. The Judge said that (i) should be answered in the affirmative according to 20 All. 35 and 5 A.L.J. 637-31 All. 9, but in the negative according to the unpublished Allahabad case No. 279/1908 which case decided, it is said, that an adverse entry in the records, of which the plaintiff was found to have been well aware, did not set time running against him, and it was only when an actual claim to the land was made on the strength of that entry that time began to run against the plaintiff, which view, the Judge says, also receives some support from S.A. (All.) 263/1907 (unreported but appended as a note at 31 All. 10). But the Judge said it was unnecessary to decide (i) above, and held that whether a cause of action accrued to the plaintiff in 1901 or not, a fresh cause of action accrued to them in August 1909. The erroneous entry of 1901, which was the blot on their title, was removed by the Collector in April 1909, and if his order had stood, plaintiff could not have maintained a suit for declaration. The Commissioner's order of August 1909 was a fresh attack on plaintiff's title and so the suit is in time. [This decision depends on the idea of a fresh cause of action; it expressly relies on the interim correction by the Collector as the ground of the decision; and it is also dissented from in (1914) M.W.N. 197.]

36 *All.* 492 Chamier and Rafique, JJ.).—The entry was in 1888. Plaintiffs' objection was thrown out in 1903; defendants applied in 1910 to have the rent assessed on the land and

eview the Commissioner's finding on the ground that his decision involved or amounted o a substantial error or defect in procedure. Their Lordships rejected this contention, tating that the above Calcutta and Allahabad decisions do not lay down the correct law. They said " Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal would lie except on the grounds specified in Section 584. No court in India or elsewhere has power to add to or enlarge those grounds It is enough n the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. When there is no error or defect in procedure, the finding of the first appellate court upon questions of fact is final, if that court had before it evidence proper for its consideration in support of the finding "—following 14 Cal. 740 (P.C.) and 17 Cal. 291 (P.C.). Again in 39 Mad. 617 (P. C.) at p. 630, Their Lordships say "'The Forest Settlement Officer (first Court), in the course of a careful examination into the circumstances and rights, held that there was no evidence of adverse and exclusive possession and enjoyment prior to 1883 and that accordingly such possession and enjoyment so proved had not lasted long enough to establish a right against the Government. In the District Court the same result was reached, and the same finding on fact was made. The matter is accordingly concluded so far as possession goes; the Board accepts, as it must accept, the finding." Thus, findings of fact could not be re-opened before the Privy Council. With this remark I proceed to consider the several issues.

Issue IV.—I shall deal first with issue IV relating to limitation as, if we succeed on it, we need not go into the other points. The survey and settlement in this district took place in 1903 to 1904 and rough pattas were issued inviting objections from wargdars as to the settlement. Exhibit IV, dated 4th May 1903, and exhibit XIX, dated 20th February 1905 (as I frame this statement from the papers as printed for the second appeal in the High Court and as I have not got before me the records as printed for the Privy Council, I am unable to give references to the pages in those records) show that plaintiff's predecessor objected to the rough pattas issued in respect of the plaint Kumries. Exhibit QQ, dated 3rd May 1911, shows that plaintiff filed a petition on 15th January 1907 to include the plaint Kumries in his patta which was finally refused in exhibit QQ. The present suit was filed on 26th November 1913. The survey and settlement registers—exhibits I and X—along with exhibits XIX (plaintiff's petition) and QQ, (the final order), show that these lands were registered as belonging to Government and that plaintiff's tarwad knew it more than six years before the date of the plaint. It seems clear on the authorities (20 All. 35 (F. B.) and almost all the other authorities referred to below say so), and it seems to have been assumed by the plaintiff also in his plaint as well as before the two lower courts (this issue itself was not considered in the High Court at all, except that it accepted all the lower appellate court's revised findings including that on issue IV) that Article 120 of the Limitation Act was the article applicable. But as the plaint includes also a prayer for permanent injunction, I would just state that Mookerjee, J., in a case in 23 C.L.J. 561 (the plaint in which had prayed for declaration, confirmation of possession, as well as for an injunction), says that though, as laid down in 20 All. 35, 31 All. 9, etc., Article 120 would apply to a suit for declaratory it is doubtful if that article will apply to the case then before him, and he says, " A prayer for injunction is a prayer for consequential relief quite as much as a prayer for confirmation of possession ". It was not necessary to decide it as he held that even if article 120 is applicable, the plaintiff was within time. In a later case in 28 C.W.N. 883, in which the plaint had also prayed for confirmation of possession and where the question arose as to which article would apply, the Judges (Chatterjee and Newbold, JJ.) thought it unnecessary to decide whether a suit for confirmation of possession is governed by article 120 or by the twelve years rule. " For as the plaintiff did not allege that his possession had in any way been disturbed, and as the only cause of action alleged in the plaint was the alleged wrong entry, the suit was rightly treated by the Munsif as one for declaration of possession," and article 120 was applied. This argument is applicable to the present case also even if the prayer for injunction is construed as one for confirmation of possession. It might also be noted that in 10 Cal. 525, where the plaint also asked for confirmation of possession, the Judges said : " Whether the six years limitation or the twelve years limitation applies, we need not discuss, because in either case the claim is within time." In 2 Pat. L.J. 124, Their Lordships at page 126 say that, if the suit was in substance a mere declaratory suit, the plaintiff cannot, as was held in 1 Pat. L.J. 73, by adding a prayer for confirmation of possession, escape the six years rule. Also in 20 All. 35 (F.B.) it was held that a suit for declaration of right to and of actual possession in immoveable property is governed by Article 120, and that Article 144 will apply only if somebody other than the plaintiff is in possession whose dispossession the plaintiff prays for. There seems indeed to be no doubt that Article 120 is the proper article to be applied in this case, and I offer the above remarks simply in view of the observation of Mookerji, J., noticed above.

The only difficult point to be settled is, which is the starting point for the six years limitation? The plaintiff says it should be counted from 3rd May 1911, the date of the final refusal. The defendant contends it should be counted at least from the date of knowledge in plaintiff of the entry in the settlement register to the effect that these lands belong to the

Government because that entry amounts to an assertion of title by the Government to the land which is the same thing as a denial of the plaintiff's title to them, and that the plaintiff must bring the declaratory suit within six years from his knowledge of such denial. Prima facie at least, the Government seems to have a good case on this point, but the authorities in India are a little conflicting, or, at any rate, they are not all one way. There seems to be no Privy Council decision, so far as I have been able to trace, on the point, and as it is rather an important point for the Government, I append below the relevant decisions of the various High Courts in India. I have not referred to any cases other than those of High Courts as the view expressed in them conform to one or other of the High Court decisions and as no special advantage would be gained by a separate discussion of them.

Cases in favour of the Government.

(1914) *M.W.N.* 197 (Ayling and Sadasiva Ayyar, JJ).—Held, following 31 All. 9 and 26 Mad. 410 that when a plaintiff brings a declaratory suit on the ground that the defendant has denied his title, there is only one cause of action which accrues from date of knowledge to plaintiff of the defendant's denial of plaintiff's title. The fact that, in consequence of such denial, a revenue or other authority has subsequently done some act in favour of the defendant (such as entry in a revenue registry . . . . .) and that in that manner defendant has become still more interested in denying plaintiff's title cannot in our opinion give a fresh cause of action for a suit under section 42 (Special Relief Act). "We respectfully dissent from the observations contra in 36 Mad. 383 and 10 A.L.J. 413."

Unreported S.A. (Mad.) 2048/1914 (Oldfield and Phillips, JJ.).—They said: "The rough pattas issued to the appellant did not contain the suit land. In view of the notice given in them that any objection to them must be made at once, we think that appellant had notice that the exclusion of any land not specified in them from her holding would be final if she took no steps. The rough pattas therefore constituted an attack on her title on which she could have sued for a declaration. She sued over six years after that attack; and her suit against the third defendant, the Secretary of State, is therefore out of time. Her suit, so far as it is against first and second defendants, who claim under third defendant, is on no better footing. The second appeal is dismissed with costs."

Unreported S.A. (Mad.) 1099/1918 (Bakewell and Phillips, JJ.).—In this also, as in the present case, Kodoth Ambu Nair was plaintiff and Secretary of State the defendant, and the dispute too was almost similar. In the settlement of 1903-04 the lands were classified as Government lands in spite of the objection taken by the plaintiff's mortgagors, the alleged owners. Plaintiff sued for a declaration of his mortgage right. It was practically admitted that a suit by the mortgagors would be barred by limitation, for there was undoubtedly an assertion of title in Government in 1903 hostile to the title of the mortgagors (vide S.A. 2048/1914). And it was only contended that plaintiff, as mortgagee in possession before the date of Government's assertion of title, is not bound to sue until he had knowledge of such assertion. It was found from the evidence in the case that plaintiff was aware of it more than six years prior to suit and so the suit was held to be barred. They also said: "The contention that a fresh cause of action arose in 1915 cannot be supported in view of the rulings in 1914 M.W.N. 197 and 31 All. 9."

31 *All.* 9 (Stanley, C.J., and Banerji, J.).—Defendant's name was entered in the revenue papers in 1895 and the title of the plaintiff was denied. In 1903 plaintiff applied for correction of papers when defendant again asserted his title and the correction was refused. Held, the refusal to have the entry corrected was a continuation of the original cause of action, viz., the entry of the defendant's name in the revenue papers in 1895 and the cause of action arose in 1895 and so the suit is barred as having been brought more than six years after that date. Eighteen (1898) A.W.N. 215 and 31 All. 10 (note) were distinguished on the ground that in those cases there was a fresh invasion of the plaintiff's right which gave him a fresh cause of action, whereas in the case before them there was no fresh invasion.

19 *I.C.* 751 (*All*)—(Lyle L.) *A* mortgaged his occupancy holding to *J* with possession in 1877. In 1880 *A's* name was expunged from the revenue papers and *J's* substituted as tenant-in-chief. In 1907 *A* applied to the Settlement Officer for correction of the revenue papers, but the application was refused. Held, the suit was barred. "The appellants (defendants) contend that it arose in 1287 fasli, when the plaintiff's name was expunged from the papers, and the suit therefore is barred. The respondent contends that it arose in 1907 when the Settlement Officer decided against him. It seems to me that the appellant's contention is correct and the cause of action for a suit for a declaration arose in 1880]"

18 *I.C.* 463 (*All*). (Chamier, J.)—The entry in the record of rights was made more than six years before suit. "The appellants (defendants) rely on 20 All. 35 and 31 All. 9. The respondents rely on other cases in which they say that a somewhat different view was taken. Several of the cases relied on by the parties have been referred to in 10 A.L.J. 413. On the reported decisions of this Court, I should be obliged to hold that a claim for a declaration of title must be made within six years of the date on which the entries complained of were brought to the notice of the plaintiffs." (Though in the case before him the suit was decreed as there was no evidence that plaintiff knew it more than six years before suit).

23 *C.L.J.* 561 (Mookerji and Chatterjee, JJ.)—They said that, assuming that Article 120 applies, the entry in the record of rights did not affect the plaintiff's possession though they may be used in evidence against him in a suit for declaration of title; that the plaintiffs were entitled to wait till the defendants had, on the strength of the entry, attempted to disturb his possession, and time does not begin to run until an actual claim is made on the strength of that entry and refer to 10 A.L.J. 413 and 11 A.L.J. 877 for this position.

46 *I.C.* 796 (*Cal.*) (Tuenon and Richardson, JJ.)—Held, that time runs against plaintiffs not from the omission of their names from the records, but from the date when their title was challenged by the defendants. It appears that on plaintiffs' complaint, an officer submitted a report recommending the inclusion of their names in the patta. First court held that plaintiff must have known at the time when the report was submitted that his recommendation was not acted upon. The Lower Appellate Court held that such knowledge could not be presumed and the plaintiffs were unaware of the failure to enter their names in the jamabandi. The High Court confirmed this. (This is in our favour and not against us.)

18 *I.C.* 226 (*All.*) (Rafique, J.)—Here plaintiff was not a party to the mutation proceedings (i.e., the entry), nor was a question of title raised at the time. Also the subsequent suit by defendant against plaintiff for profits gave a fresh cause of action. 31 All. 9 was distinguished on the ground that plaintiff was not a party to the mutation proceedings, and that the suit for profits gave a fresh cause of action, whereas in 31 All. 9 the plaintiff's title was denied at the time of the entry and the later refusal to correct the entry was a continuation of the original cause of action. (This is also certainly not against us, for there was not even evidence of the knowledge in plaintiff more than six years prior to suit of the denial of his title.)

11 *C. W. N.* 186 (Rampini and Mookerji, JJ.)—Plaintiff's application for registration was refused by the revenue authorities in 1883. But he continued in possession till date of suit in 1894. Held, the article applicable is 120 and that the right to sue accrued on the order of the revenue authorities and the suit was barred. (This is also not against us, because here there was no original entry adverse to, and known to, the plaintiff and a subsequent rejection of his objection petition. The plaintiff, in the first instance, applied for registration and it was refused. Obviously the cause of action could accrue only on such refusal and not on any earlier date.)

22 *I. C.* 608 (*All.*) (Richardson, J.J.) and Banerji, J.)—The entry in 1880 was made in the absence of the predecessor-in-title of the plaintiff and there was admittedly no evidence to show that in 1880 the title of the plaintiff's predecessor-in-title was denied. In 1907 plaintiff applied for correction of entry which was refused. Held, cause of action arose only in 1907. (This is not against us, for there is nothing in it to show that plaintiff was aware of the wrong entry till 1907, and the judgment expressly rests on the ground that the erroneous entry was made in the absence of the plaintiff's predecessor-in-title and that there is no evidence to show that plaintiff's title was denied in 1880.)

35 *I. C.* 241 (*All.*)—(Piggott, J.)—The facts are not relevant for this case for the cause of action accrued for the first time within six years of the suit, but he says that the principles relating to such suits are correctly laid down in 36 All. 492.

2 *Pat. L. J.* 124 (Mullick and Atkinson, JJ.)—This particular case was for enhancement of rent, but they say that in declaratory suits the point from which limitation is to run is the date of the publication of the adverse entry in the record of rights (20 All. 35), unless there has been any subsequent invasion of the plaintiff's right in which case it starts from the latter date. (5 All. L. J. 638 note=31 All. 10 note.)

2 *Pat. L. J.* 493 (Sharfuddin and Roe, JJ.)—At page 495 they say, "we are not prepared to go quite as far as Mullick, J., in 1 Pat. L. J. 73, but it is clear that where there is a definite challenge to the plaintiff's right by an entry made in the record of rights and where the fact is patent that plaintiff must have been aware of that challenge to his right, the suit, if brought on that challenge, must be brought in accordance with the six years rule of limitation. If, in spite of the challenge, plaintiff retains possession of the property, he is not required to institute any suit on that challenge, but may institute suit within six years of any new challenge which has the effect of prejudicing his rights." In the case before us it was alleged there was a new challenge in 1911. It is not suggested that the new challenge has in any way placed the plaintiff in a position worse than that which he occupied between the date of the finally published record of rights and the year 1911. They say that the plaintiff was fully aware of the challenge contained in the record of rights and hence the suit was held barred.

11 *C. W. N.* 48 (Mitra and Holmwood, JJ.)—Record of rights was finally published in 1890. Objection to it was rejected in 1900. Suit was brought in 1902. Held, article 14 of the Limitation Act does not apply to such suit. Nor, it was said, does the cause of action arise in 1890 because section 103-B of the B. T. Act, which governed the case, merely raises a presumption of the correctness of the entry and it is not necessary to bring a suit to avoid a presumption.

33 *C. L. J.* 592 (Mookerji and Buckland, JJ.)—At pages 596 to 597 Mookerji, J., says that article 120 applies to a suit for declaration of title to immoveable property, which must consequently be brought within six years from the date when the right to sue accrues. "It is plain

that where there is a right to sue, it cannot be impossible to decide when it originates, but the answer obviously depends on the circumstances of each case." And then he says. "There has been some divergence of judicial opinion on the question whether there may or may not be instances of successive accruals of causes of action for relief by way of declaration." And he refers to (1914) M. W. N. 197, 31 All. 9, 26 Mad. 410, 36 Mad. 383; 10 A. L. J. 413; 36 All. 492; 3 Pat. L. J. 361; 18 (1898) A. W. N. 215, 5 A. L. J. 638 note (= 31 All. 10 note), 2 Pat. L. J. 124 and 2 Pat. L. J. 493. The Subordinate Judge in this case had found that the cause of action arose in 1914 within six years of the suit, when the first defendant, in denial of the plaintiff's title, mortgaged and sold shares in the disputed property in excess of her lawful interest therein. But defendant contended that the cause of action arose in 1898 when her husband filed a written statement and gave his deposition in suit in which he denied that the plaintiff had one-third share and himself claimed a one-fourth share. "The Subordinate Judge has held that these assertions, which were not accompanied or followed by an overt act, were not calculated to cast a cloud on the title of the plaintiff and did not accordingly give rise to a cause of action. This, in our opinion, is a reasonable view. But it is also clear that the *present cause of action is entirely distinct from and in no sense a continuation of a prior cause of action, even if it be held that a cause of action did arise in* 1898," and he holds that the claim for declaratory relief is not barred.

Our argument on this question of limitation is briefly this :—

As soon as the denial of the plaintiff's title comes to his knowledge, he is entitled to sue for a declaration, i.e., a right of action accrues to him. In fact almost all the above decisions recognize this position. The next question is, could there be a fresh accrual of the cause of action so as to give a fresh starting point of limitation. If (1914) M. W. N. 197, 20 All., 35 (F. B), 26 Mad., 410, S. A. (Mad.) 1099 of 1918, 1 Pat. L.J., 73, etc, be held to lay down the correct law, there could be no such fresh starting point. But if, as has been laid down in so many cases referred to above, it be held that there would be a fresh cause of action and a fresh starting point on every fresh invasion of the plaintiff's right, the next question is, does the final rejection of the plaintiff's petition in May 1911 constitute such fresh invasion and furnish such fresh cause of action? 31 All., 9 clearly holds it does not. 19 I. C., 751 goes at least to this extent (if not also to the extent of holding that there could not be any fresh starting point). None of the cases above referred to as laying down that there would be a fresh starting point on a fresh invasion of the plaintiff's right, says that such rejection constitutes a fresh cause of action. (I might say that I have referred to them all in detail not because they are directly against us, nor because they could not be distinguished, but mainly to show that none of them say that such rejection constitutes a fresh cause of action). In fact most of them distinguish 31 All., 9 and many of them (including the latest case, 38 C.L.J., 592) approve of the phrase 'continuation of the original cause of action' used in 31 All., 9. The only case which seeks to throw any aspersion on 31 All., 9 is 41 All., 509, but that is not against it at all. Again, if 2 Pat. L.J., 493 is correct, a new challenge to constitute a fresh cause of action must have placed the plaintiff in a position worse than that which he occupied between the date of the finally published record-of-rights and the date of such new challenge. This cannot be said of the present case even if the final rejection be considered a new challenge. Perhaps the case which goes furthest against Government is 11 C.W.N., 48, but no authorities are referred to therein, nor are there any special reasons given for the decision. The Judges seem to have treated it as a case coming specially under the Bengal Tenancy Act, and even as regards the necessity of bringing a suit to avoid a presumption, the later case in 23 C.W.N., 883 is an authority to the contrary.

I have done with issue IV.

I shall, before considering the other issues, deal with the question of the burden of proof and this I shall consider from two standpoints :—(A) whether the presumption to be applied to the suit lands is the one prevailing in Malabar or that in South Kanara, and (B) whether, if it is the one prevailing in South Kanara, such presumption has not been correctly laid down in 28 Mad., 257 (F. B.) and 3 Bom. 452, i.e., whether those decisions are wrong.

(A). The historical facts are succinctly referred to by Oldfield, J. in his judgment. It is true that in Exhibit XIV, a Government Order of 1860, it is said : "the southern part of Bekal forms part of the old Nayar (or Malabar) Kingdom and has still its Nayar population and customs." (But the very previous sentence shows that the practice of wargdar Kumri stands on no better ground of right there than in North Kanara and the above is only a reason given for continuing the practice in Bekal). The *Malabar District Gazetteer*, Volume I, page 57 refers to the domains of the Kolatiri or Chirakkal Nayar family (that this is the family meant is evident from page 396). as having included part of Kasaragod; and in *South Kanara District Manual*, Volume I, page 2, the portion of the district south of the Chandragiri river in the Kasaragod taluk, the tract now in question, is described as having come under Kanarese rule in comparatively recent times. But these certainly do not prove the plaintiff's case and a reference to the authorities, as his Lordship says, makes it clear that the Chirakkal conquest endured only for about ninety years and that before and after it the sovereign power was not Nayar, but Vijianagar and Bednore, and Tippu Sahib and the British.

The earliest dynasty distinguishable in the district is that of the Kadambas (*South Kanara District Manual*, Volume I, pages 58, 61 and 85. *Fleet's Gazetteer of Bombay. Kanarese*

Dynasties, Volume I, part 2, pages 539, 565). The Kadambas were succeeded by the Vijianagar Empire about 1336 A.D. (*South Kanara District Manual*, Volume I, page 64), but its supremacy ended with the Muhammadan capture of Vijianagar in 1565 and on the west coast with the formation of a league for the division of its territories, Mangalore in South Kanara falling to the share of the Zamorin of Calicut (Op. Cit., page 69). This probably marked the beginning of such supremacy as the Nayars attained north of Malabar; and although there is no distinct evidence of the circumstances of the conquest by the Chirakkal Raja, whose territory adjoined South Kanara on the south, it must be admitted that he had, between 1565 and 1650, established himself and built forts at Bekal and Chandragiri (Op. Cit., Volume I, page 73; Volume II, page 247 where it is stated that Bekal was subject to the Kollatiri or Chirakkal Rajas until the time of Sivappa Nayak's invasion, after which they formed part of South Kanara). But this conquest was of comparatively short duration and, moreover, there is nothing to show its effective character or the introduction during it of Nayar customs and privileges which it would be against the interest of the conquering power to introduce. Anyhow from about 1650 the Ikkeri or Bednore family rose into power and Kanarese supremacy was asserted (Op. Cit., Volume I, 73, Volume II, 247. *Sewell's Antiquities of South India*, Volume II, 177). Bednore was succeeded by Hyder-Ali in 1763 and the latter's successor—Tippu—by the British in 1799 (*Macleane's Manual of Administration*, III S. V. Baicul). Thus, the Nayars, as represented by the Chirakkal Raja, were in possession of Bekal taluk only for less than a hundred years, the extreme dates being 1560 to 1650. Before this period there was obviously no occasion for introducing the Nayar customs and privileges. There is nothing to show, nor is there any reason for supposing, that they were introduced even during this period. Even if they had been introduced during that period there is nothing to show, nor is there any reason for supposing, that they would have been maintained in the subsequent period which included the Kanarese, Muhammadan and British supremacies and extended for more than two hundred and fifty years. The natural and reasonable inference or presumption, having regard to the character of the privilege claimed (viz., it being in derogation of the sovereign's rights), would obviously be that they would not have been introduced, and that even if introduced they would not have been maintained.

Nor does the fact that the Kumri cultivation in Bekal is of a more elaborate and permanent character than in the other tracts of South Kanara in any way show that it must have had its origin in some definite privilege such as the customs of the Nayar Kingdom would involve. It is true that it is carried on in a more permanent and elaborate manner in Bekal than elsewhere in South Kanara and the Kumries there were even treated as the bonafide property of the ryot, capable of being alienated by him. (See 3 Bom., 452 at pages 557, 575, *South Kanara District Gazetteer*, Volume I, page 209.) It is also true that though Exhibit XIV (a Government Order of 1860) prohibited Sirkar Kumri (or Kumri for which Government granted licences and collected dues direct) throughout the district, warg Kumri (that allowed to be carried on by the wargdar in the Government forests adjacent to his warg) was retained in Bekal alone. (See the last five paragraphs—16 to 20 in Exhibit XIV of the order, dated 23rd May 1860, which also state the reasons for such exceptional treatment. Also *South Kanara District Gazetteer*, Volume I, page 209.) These facts can well be explained independently of the position contended for by the plaintiff. One explanation is, as stated in 3 Bom., 452 at 575, "the increase of population and the consequent intensifying of agriculture in Bekal had brought the holdings of the several ryots into close and sharp contact with each other and had given some definite value to every acre of land." Another and a more definite explanation which is given by the Government itself in Exhibit XIV is that Bekal taluk adjoined Malabar where Kumri is unrestricted, and that "it was carried on as a regular part of their farming by the resident landholders, not by wandering tribes unconnected with the soil, as in North Kanara." Oldfield, J., says: "No doubt this was followed by the statement above referred to regarding the inclusion of Bekal in the Old Nayar Kingdom and its possession of a Nayar population and Nayar customs. But this statement was not the sole ground of decision, and it is unnecessary to regard it as the principal one or as intended contrary to the actual probabilities to involve an admission that the Nayar law regarding Kumries was in force." This is, of course, one way of getting rid of the effect of the sentence referred to. But could it not further be argued that, even if we give the fullest meaning to the sentence, it only means that Nayars settled down in large numbers in Bekal as a result of the conquest by the Chirakkal Raja and they carried with them their social customs also, which is quite likely under the circumstances, and that such Nayar population and customs were still there in 1860. What we are concerned with is whether the presumption prevailing in Malabar relating to the ownership of forest and waste lands has been introduced into South Kanara, and as this presumption in Malabar is in favour of the subject and against the Government, and as the Nayars occupied Bekal as conquerors, and as it would therefore be against their own interests to introduce this law into Bekal, unless there be some positive evidence of its introduction thereto, it should be taken that it has not been so introduced. It is clear that the Government, in allowing the warg Kumri to continue in Bekal, did so, not because of any right or supposed right of the wargdar so to it, for the same Government Order prohibited Sirkar Kumri even in Bekal and warg Kumri also in all taluks except Bekal, and it was expressly stated: "The practice (wargdar Kumri) stands on no better ground of right there (Bekal) than in North Kanara" and the practice was

allowed statedly and solely because of the general hardship involved in its abolition, an incr in the rate levied on its being proposed. This is expressly stated in exhibit XIV (see p graph 17 of the order) as the reason for permitting its continuance in Bekal. This was the way in which the Board of Revenue interpreted Exhibit XIV (see Exhibit XVI—last p graph), and the Government attempted no disclaimer when this interpretation was submi for its information. The more permanent and elaborate manner in which Kumri is carried in Bekal is, and was, regarded as being explicable without reference to any but a local connec between that taluk and the Nayar Kingdom. Thus the presumption applicable to South Kan viz., that laid down in 28 Mad., 257 (F.B.), should apply also to the land in dispute. If i said that the suit land is only "secondary growth", as stated in page 270, and that the presu tion therein laid down, viz., that it belongs to some private owner should be applied, our ans is that in the same sentence it is stated that this presumption may be rebutted, as for instar by showing that it is part of a warg that was abandoned or forfeited or escheated to the Gove ment *or by showing that it was not of a warg but was cultivated as Kumri.* This is also l down in 3 Bom., 452 after a very exhaustive consideration. (See under issues II and III below The suit land is admittedly cultivated as Kumri, and so the presumption again as laid down it, as well as in 3 Bom., 452, is that it is Government property. There is, of course, the furt question whether such presumptive ownership of the Government has been rebutted in this c by evidence to the contrary. This I shall consider later on along with issue II dealing w adverse possession.

(B) Whether 28 Mad., 257 (F.B.) and 3 Bom., 452 are wrong—28 Mad., 257 (F.B.)—T elevant general discussion is in pages 267 to 289. They go into the question so fully, taki nto consideration all the relevant circumstances that it is doubtful whether a different conc ion is possible. The most important circumstance against us is some statements in some repo f Munro in 1800 and thereabouts (immediately after the British got the district after Tipp eath) to the effect that "all land" in Kanara is "private land", but their Lordships point o y elaborate quotations from those very reports of Munro as well as his later reports and writin that his "all land" referred only to occupied land which yielded revenue (he was specia concerned with the land revenue assessment of the district) and not to the great tracts of imm morial forests which yielded none, and that Munro himself was clearly of opinion that all su forests in South Kanara were the property of the Government (see pages 267, 269 and 271 277). They also point out that the revenue system and practice in the country, since it ca under the British, was to treat the immemorial wastes as the property of the Governme (see generally pages 267 to 281 and 283 to 285). And they say at pages 281: "Such being t established revenue system and practice in the district for the past half century it would, think, require much stronger evidence than has been adduced before us in these cases, to justi us in laying down any rule that the practice is not justified by the revenue history of the distri and that on the contrary there is a presumption that immemorial waste land adjacent to what admittedly warg land must belong to some private owner as contended by the learned vakil f the appellant." (I might state that in our present case there is hardly any evidence to sho that such practice is not justified by the revenue history of the district). They also consider th period (nearly 400 years) during which time the Hindu Kings of Vijianagar and Bedno lynasties ruled over the district and say that the available evidence, such as it was, pointed the conclusion that the Hindu Common Law system—one of the essential features of which we hat immemorial waste lands of the country generally belonged to the ruling power—was estab hed during these centuries of Hindu rule. (See pages 281 to 282.) They also point out tha uring the forty years of Muhammadan supremacy, who succeeded the Hindu supremacy an receded the British rule, there was no doubt that the Muhammadan Government exercise roprietary rights over waste lands in accordance with Muhammadan Law, and that the Britis Government, when it took Kanara from Tippu, succeeded to the rights which he then actuall xercised as sovereign (pages 282 to 283). They also point out that the fact that the Britis Government has from the earliest times formed *new wargs* (called Hosagame wargs) by grant ade from immemorial waste (as distinct from re-grants of escheated or abandoned wargs) con lusively negatives the contention that all waste lands in the district belonged to the ancien argdars (pages 284 to 285). They also point out that their conclusion—viz., that the presump on is that immemorial wastes belong to Government—is in accordance with the decisions of th High Court in all the prior cases in which the question had been considered and that they ar ot aware of any decision which doubts the correctness of these various decisions and explai way 9 Mad., 187 (Secretary of State and Vira Rangan) as having nothing to do with the presen se (pages 287 to 288).

3 *Bom.* 452.—In this plaintiff sued for recovery of possession of four tracts of forest land in orth Kanara. As to three of the tracts plaintiff based his claim on certain sanads alleged to ve been granted by the officers of Tippu Sultan to his ancestors, while to the fourth he claimed title by prescription. It was held on the evidence that the sanads put forward were not oved to have been executed by any person having authority to execute them. Green, J. at ges 462 to 463 says: "There is however one observation which I wish to make with reference the sanads, that, whether they be spurious documents or not, the fact of the plaintiff putting em forward as the root of his title, so far at least as concerns the greater portion of the pro- rty claimed, is an admission that at the date of those alleged sanads the then Government

had the *power* to make the grants in question If, therefore, the sanads are out of the way, the plaintiff has to establish that he had at the institution of the suit succeeded to the rights of property which by his own case, at the respective dates, belonged to the Government, and would, in the absence of any private right shown then to exist therein, have vested in the East India Company after the taking of Seringapatam in May 1799 and the subjugation of the country previously under the rule of Tippu Sultan". Thus this learned Judge did not think it necessary to go into the question of the general presumption as to the ownership of the forests, and he contented himself by holding the plaintiff to his own admission and by laying down, after an exhaustive consideration (see pages 463 to 515), that Kumri cultivation by plaintiff could not by itself confer on him any proprietary right as against the Government. But the other learned Judge—West, J.—goes also into the question of the presumption at considerable length (his discussion beginning at page 522) and comes to the conclusion (see page 584) that the principle from which we must start is that waste lands belong to the State.

I shall now deal with the other issues in order:—

Issue I.—As before stated, the plaintiff has not produced any mulpattas or title-deeds in proof of his allegation that, (*a*) some of the plaint Kumries are portions of his ancient muli warg. So far as his claim by the right of purchase and mortgage was concerned [see (*b*) to (*d*) of paragraph 5 of the plaint as stated above], he relied mostly on exhibits A to E, J, K and R to GG, and the decision on the issue depends mostly on the admissibility in evidence of these documents. Having regard to the facts elicited at the hearing before the High Court, we have to consider the admissibility of these documents in four separate groups: (1) Exhibit C, (2) exhibit R, (3) exhibits J, K, T, U, W, Y, Z, AA to FF, (4) Exhibits A, B, D, E, S, GG. (1) *Exhibit C* is an original document and it is clearly admissible under section 62 of the Evidence Act as being primary evidence. (2) *Exhibit R*, is a registration copy of an original to which section 57 of the Registration Act applies, sub-section 5 of which says that such copies shall be admissible for the purpose of proving the contents of the original documents. Both the Judges of the High Court held that this document is admissible without going any further into the question. But a registration office copy is inadmissible in evidence under section 65, clause (*f*) of the Evidence Act, unless a case for the reception of secondary evidence is made out (11. I.C., 50). When plaintiff had not proved the loss of the original deed, he is not entitled to sue upon and tender in evidence a registration office copy of it (11. A. L. J., 255). *In* 11. *I.C.*, 50, the plaintiff relied upon section 57 (5) of the Registration Act, but Chamier, J. says: "But such copies (registration copies) are not copies of the original deeds. They are copies of the copies of those deeds entered in the books of the Registration office. Of course there is no doubt that in cases governed by clause (*a*) or clause (*c*) or clause (*d*) of section 65 of the Evidence Act, registration office copies are admissible in evidence, but they are admissible not as certified copies of the documents, but because section 65 of the Evidence Act and section 57 of the Registration Act provide that they are admissible in proof of the contents of the original documents. This is, I believe, the view which has always been taken. It is stated as being the law without any question in the notes of Messrs. Ameer Ali and Woodroffe on the Indian Evidence Act, and I gave effect to this view in a case reported in 7 O.C., 365". In 11. A. L. J., 255, plaintiff had not proved the loss of the original and sought to put in a registration copy of it. It was held that such copy was admissible only if a case had been made out for the introduction of secondary evidence and that section 65 (*f*) did not apply to the case. Plaintiff's contention was that the original deed was a document of which a certified copy was permitted to be given in evidence by section 57 (5) of the Registration Act. The learned Judges said that as long ago as 1874 it has been held in 22 W. R., 303, that this provision of the Registration Act only shows that when secondary evidence has been introduced in any way, a copy certified by the Registrar is admissible for the purpose of proving the contents of the original document. "The provision in question was probably enacted in order that copies of registers might be adduced in proof of the original documents. Without such provision the copies of the registers might have been open to the objection that they were copies of copies." There is absolutely no evidence in our present case to show that the original of this document has been lost or destroyed, or that plaintiff is otherwise entitled to let in secondary evidence of it, and hence Exhibit R should be held to be inadmissible.

(3) The documents in this set, as well as in the fourth set, are copies of copies. Copies of the originals of these documents were produced before the Deputy Tahsildar of Kasargod in 1850. This is evident from exhibit O O which is a ferist of the copies of the original documents said to have been produced before him. That it was copies, and not the originals themselves that were produced before him, is evident from the fact that some of the documents in question are in the Kanarese language and the others in the Malayalam language, but written in Kanarese characters. Moreover, the originals were stated to be on cadjan. Also P.W. 17 says that when he asked plaintiff about the original documents, he said he did not know what his predecessors did with the same. The documents which have been marked as these exhibits are copies of such copies produced before the Deputy Tahsildar. Having regard to the facts elicited before the High Court we have to take it that the copies produced before the Tahsildar were compared with the originals (see Oldfield J.'s judgment: also the District Judge's second judgment, paragraph 4) and that the copies marked as exhibits have been compared with the copies before the Tahsildar (see Seshagiri Ayyar J's judgment). The difference in the consideration of the third and fourth sets of documents is this. Plaintiff had taken out

summons for the production of the papers retained in the Taluk office. Those copies from which exhibits J, K, T, U, W, Y, Z, AA to FF (the third set) were transcribed were produced on such summons, and were in court, though this fact was discovered very late before the High Court; while the copies from which exhibits A, B, D, E, S, GG were made were not in court. As soon as the High Court found out this fact, it held that so far as the third set of documents are concerned, secondary evidence of an admissible description has been produced, and the only question is whether secondary evidence is admissible at all. But is it not a matter for argument that though the copies from which the third set of documents were made are proper secondary evidence and were in court, yet as the plaintiff chose to mark only the copies of such copies as his exhibits, he should not be allowed to rely on such original copies for proving his case? For could we not say that the question is not whether proper secondary evidence is before the court, but whether the evidence produced and marked as exhibits in the case, and on which the parties were content to go to trial, constitute proper secondary evidence? Be this as it may, there is the important question with regard to the third set of documents whether a proper case has been made out for the admission of secondary evidence.

Plaintiff relied upon various clauses of section 65 of the Evidence Act to show that he is entitled to let in secondary evidence, and this, too, at various stages in the case. He relied upon section 65 (*c*), alleging that the originals had been lost so that he is entitled to put in the copies. This contention he put forward in the trial court itself (in fact this was the only contention before the first court for letting in secondary evidence). The Subordinate Judge, as well as the District Judge, on both the occasions, find that the originals are not proved to have been lost or destroyed, and hence section 65 (*c*) is inapplicable, and the High Court too, has accepted this finding. It is, of course, clear that secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in section 65 and that when loss of the original is alleged, and no sufficient evidence thereof is produced no secondary evidence is admissible under section 65 (*c*) (see 14 Cal., 486 (P. C.); 16 Cal., 753 (P. C.) at 756). *In* 19 *Cal.*, 438 (P. C.) at page 442, Their Lordships say that whether or not sufficient proof of the search for, or loss of an original document to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled except in a clear case of miscarriage. And then they say: "But the evidence here is very far indeed from raising a case for overruling the Subordinate Judge (first court), even if his judgment had not been supported, as it has been, by the appellate court". In our case there are concurrent findings of three courts saying that the loss has not been satisfactorily proved. That it is a point proper to be decided by the Judge of first instance has also been pointed out in other cases (see 34 I. C., 153 and 45 I. C., 888. See also Ameer Ali and Woodroff's Evidence Act, 5th Edn., page 490, footnote 8, referring to 19 Cal., 438 and 9 W. R., 249). *In* 14 *M.I.A.*, 458 (a case before the Evidence Act) Their Lordships of the Privy Council say at pages 460 to 461 that though the rule in India regarding the admissibility of copies is not so stringent as the one prevailing in England, yet it is the duty of a Judge, before admitting a copy of an original document as evidence, to consider what weight and value should be given to it and to test its authenticity by satisfying himself that the grounds for not producing the original are well founded, so as to let in a copy as secondary evidence. Then they point out that there is considerable difference between cases where documents come in as mere links or as part only of the evidence in the case and those in which the suit is actually brought on the instrument of which a copy is tendered and the whole cause of action depends on the proof of the original instrument, and they say that in the latter case (our present case is also one of this sort) "strict proof may properly be required". In the present case both the Subordinate Judge and District Judge give sound reasons for the finding that the loss of the original has not been proved—such as P.W. 17, the only witness examined on the point, admitting that he has no knowledge as to what has been done with the originals, his deposing that plaintiff himself told him that he did not know what his predecessors did with the same, the plaintiff himself not entering the witness box to prove the loss, etc., but whatever the grounds may be, as the question is one of fact, the finding thereon by the first appellate court should be held to be final and binding on the Board. As Oldfield, J., puts it, "it has not been shown how that finding is not one of fact or is otherwise inacceptable". So that the plaintiff should not even be allowed to re-open this matter before the Privy Council, apart from the fact that the findings thereon by the three courts in India are concurrent.

Plaintiff relied also on section 65 (*e*) of the Evidence Act, alleging that the copies kept in the taluk office are 'public documents' within the meaning of section 74 (2), and hence he is entitled to put in certified copies thereof as secondary evidence. This contention he put forward for the first time before the District Court. Both the District Court, as well as the High Court, (see Seshagiri Ayyar, J.'s judgment) held that the copies kept in the taluk office are not "public records of private documents". Justice Seshagiri Ayyar says that section 74 (2) only applies to documents like wills, etc., deposited in the Registrar's office or other private documents which under special laws are permitted to be deposited in public offices. *In* 7 *Cal.*, 76 it was held that copies of Government measurement chittas produced from the Collector's office are not public documents. Their Lordships said: "There is nothing to show beyond the fact that they came from the collectorate that they are the record of measurements made by any Government officer.

They are only abstracts of measurement chittas of 1126-27. Whether they are correct does not at all appear; not is it apparent in what year they were made or in what respect they were of public use. Hence they are not public documents within section 74". *In 9 Cal.*, 741 it was held by Garth, C. J. and Macpherson, J., that chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector and are not evidence against private persons for the purpose of proving that lands described therein are or are not of a particular character or tenure. The maps and plans mentioned in section 83 are *maps and plans made by the Government* for public purposes and they quite agree with 5 Cal., 287 that a map or plan made by the Government for private purposes, or when the Government is acting otherwise than in a public capacity, is clearly not evidence 23 *Mad.*, 499 related to a copy of a will executed at Colombo. It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that it was the true copy of a last will and testament made from the Protocol of record filed in his office. No evidence was tendered that the copy had been made from, and compared with, the original. It was held by White, C. J., and Benson, J., that the document was inadmissible in evidence, that it was not a public document within section 74 (1) (iii) or (2) of the Evidence Act, and that in the absence of evidence that it had been made from, and compared with, the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable.

(4) As regards this set of documents, viz., exhibits A, B, D, E, S, GG., the ground on which the third set of the documents should be rejected, viz., that no case had been made out for the admission of secondary evidence, is applicable to this set also. There is also the additional ground on which the fourth set is to be rejected, viz., that being copies of copies which have not been compared with the original, they are not secondary evidence at all. Section 63 (3) and illustration (*c*) to section 63 are clearly against plaintiff. Authorities also point to the same conclusion. *In 7 All.*, 738 at 742 to 743 it was held by Brodhurst and Mahmood, JJ., that a copy made from a certified copy of a decree, but not compared with the original decree, is not admissible in evidence. Mahmood, J., says that whatever may have been the law before the Indian Evidence Act, the rule contained in that enactment must now be strictly enforced. And he refers to the scope of sections 61 to 63 with a special reference as well to section 63 (*c*). *In* 54 *I.C.*, 941 (Patna), it was held by Coutts and Sultan Ahmed, JJ, that a copy of a copy was inadmissible in evidence, and that when a document is inadmissible in evidence, no question of its construction arises and the party relying on it must fail. Ameer Ali and Woodroffe (5th Edn., page 476) also say that copy of a copy is inadmissible in evidence and refers also to 28 Mad., 257 (F B.) at page 299 and also to Taylor on Evidence, section 553. It is true that in 7 M.I.A., 123, it was held that a copy of a document coming out of a public office and certified by the proper officer of that department as a copy of a copy deposited there was admitted as evidence, and that in 14 M.I.A., 453, a copy of a copy of an original sanad, registered and proved in another suit, was admitted as evidence. But it is enough, as Mr. Justice Seshagiri Ayyar says, to point out that they were decided before the Evidence Act was passed, and that after the Evidence Act these decisions could not be followed. Ameer Ali and Woodroffe, in footnote (4) at page 476, 5th Edn. of their book also say that these cases are no longer law so far as they relate to copies. In 16 Cal., 753 (P. C.) at 756, it was held that a copy of a deed which deed was a 'copy in accordance with original' and which deed was on the record of the court in another suit was held admissible This decision was after the Evidence Act came into force. Their Lordships said; "it was a copy of a deed which was filed in another suit and is still on the records of the court." As Mr. Justice Seshagiri Ayyar says, they were only considering whether there had been proper proof of the copy tendered in evidence and they had not to consider the question of relevancy. Apparently all that was objected to was that there was no sufficient proof of the copy. That is the reason why the remark about the original being on the records was made. Seshagiri Ayyar, J., says "to hold otherwise would be to impute to the Judicial Committee a deliberate disregard of section 64 (3); and I do not think there is any reason for taking this view." Anyhow as section 63 (3) and illustration (*c*) to section 63 are so very clear, there might probably be no use of going even into the above authorities.

Thus (1) exhibit C is clearly admissible. (2) As regards exhibit R, the secondary evidence produced is quite proper, but as no case has been made out for the admission of secondary evidence it should be held to be inadmissible. (3) As regards exhibits J, K, T, U, W, Y, Z, AA to FF, it is at least doubtful whether the secondary evidence produced could be considered to be proper, but, assuring it is, these documents are inadmissible in evidence because no case has been made out for the admission of secondary evidence. (4) Exhibit A, B, D. E, S, GG are inadmissible, both because they are not proper secondary evidence and because no case has been made out for the admission of secondary evidence.

As regards the third and fourth sets of documents, yet another argument was advanced by the plaintiff (for the first time before the High Court) that even if those documents are by themselves inadmissible, yet other secondary evidence of their originals had been produced by him and that he is entitled to put it in. The contention was that exhibit OO contains admissions in writing by the defendant or by his representative in interest as to the contents of those original documents, and hence plaintiff is entitled to put in these written admissions as secondary evidence under section 65 (*b*). Exhibit OO is a list of documents of title produced by plaintiff's predecessor before the Tahsildar at the inquiry held by the latter in 1850 in

compliance with an order of the Collector, the purport of which is given in 3 Bom., 452 at pages 756 to 757. I do not think that we could contend with any chance of success that the existence and contents of the original documents then produced are not indicated with sufficient clearness to make the entries in exhibit OO admissions regarding them. Assuming that they constitute such admissions, the next question is whether the Tahsildar can for the purpose of section 65 (*b*) be treated as the defendant's representative in interest. Whether or not this expression "representative in interest" includes all persons whose statements can be proved against a party as admissions, it is clear that section 65 (*b*) does not apply unless the Tahsildar in the present case was a person who could bind the defendant by such admissions of his. It does not appear that the Tahsildar had any such authority in the present case. As appears from 3 Bom., 452 at page 757 he was only directed "to describe in detail the proofs" as will be brought forward by the claimants. No presumption is to be made regarding the delegated powers of public officers. *In* 26 *Mad.*, 268 at pages 279 to 280, Bashyam Ayyangar, J., referring also to Story on Agency, section 307 (*a*), points out the distinction as to the extent to which acts and declarations of a private agent bind his principal and those of public agents bind the Government, and says that the Government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held out as having authority to do the act or is employed in his capacity as public agent to make the declaration or representation for the Government; and it is the duty of persons dealing with public officers to inquire as to their real or apparent power and authority to bind the Government. Reference is also made to 8 M.I.A., 554 as showing the same distinction. This case, so far as this proposition is concerned, has been followed in 22 I. C., 107 at 115 where Their Lordships say: "It was not argued before us that Subba Rao was acting under the authority of Government, or that, in the absence of ratification by Government, Government would be bound by his action. A clear authority against such a view, if it were needed, is to be found in 26 Mad., 268 at page 279". 26 Mad., 268, so far as this position is concerned, is also referred to with approval in 30 Mad., 270 at 273 and 31 Mad., 264 at pages 265 and 267. The very general language in which the authority to the Tahsildar is couched in the present case should be taken to indicate that he had simply to prepare a general summary of what claimants adduced and that he was not authorized to prepare any record which could bind Government as to the details of the documents he saw.

As stated before, the lower appellate court held after a consideration of exhibits C and R (which the High Court said were admissible) and also of exhibits M and JJ (which Seshagiri Ayyar, J, said should also be considered) that the plaintiff has not proved his title to any of the suit Kumries. Amongst the grounds of appeal to the Privy Council, there is no ground alleging that these documents have in any way been misconstrued. Therefore his decision on this question with reference to these documents must be held to be final There is also no such allegation of misconstruction in the grounds of objections that plaintiff filed in the High Court against the lower appellate court's finding, ground No. 6 stating simply that the reasons for rejecting them are unsound. Even misappreciation of the evidence by the lower appellate court is no ground of interference with its findings on such points either by the High Court in second appeal or for the same reason by the Privy Council on appeal from such second appeal.

As also stated before, the lower appellate court held that, if all the documents, exhibits A to E, J, K, and R to GG are held to be admissible, plaintiff has proved his title to most of the plaint Kumries. It is a matter for argument before the Privy Council that, even if these documents are admissible in evidence and hence prove the contents of their originals or even if the contents of such originals are allowed to be proved by the Privy Council by means of the admissions regarding these documents in exhibit OO under section 65 (*b*) of the Evidence Act, still all these, along with the oral evidence, only show that these documents or their originals are genuine and that, as there is no evidence that the plaintiff's seller or mortgagor in these several documents had the title to the properties comprised in them, these documents do not establish plaintiff's title to the suit properties as against the Government.

Issue II—One act of possession relied in order to establish adverse possession is the cultivation of Kumri in portions of the lands claimed. The whole question whether Kumri cultivation could give a proprietary title to land was examined exhaustively in 3 Bom., 452. (see especially Green, J.'s judgment, pages 468 to 515, and West, J.'s judgment, pages 558 to 594) and was decided in the negative. Green, J., at page 500, also refers with approval to the opinion of Messrs. Blane and Fisher, viz., that the entry of Kumri assessment in a warg did not establish or show any right of *general ownership* of the wargdar in any tract of jungle over which, or over parts of which, Kumri cultivation had been used to be carried on, and that, whatever the rights of wargdars paying Kumri assessment might be in respect of jungles in which Kumri cultivation might, for the time being, be carried on, the jungles themselves still belonged to the Government, to the extent that Government might restrict or put a stop to all Kumri cultivation, remitting, however, wholly or pro tanto, the levy from wargdars of Kumri assessment. In 28 Mad., 257 (F. B.) at page 271, Their Lordships say that they are not aware that the correctness of the above Bombay decision, to the effect that Kumri cultivation could not give a proprietary title to land, has ever been judicially doubted and that though it was given in reference to a case which arose in the northern part of North Kanara, where the land tenures are in some respects different from those of the rest of Kanara, yet the grounds on which it is based are of general validity, and that in their opinion the decision is applicable to South Kanara

also. As also stated by Green, J., in 8 Bom., 452 at page 514, Kumri right in one person may be quite consistent with general ownership in the soil being in another, and if such general ownership be not in the plaintiff, there can be no doubt that it must be with the Government. Again Seshagiri Ayyar, J., in his judgment, points out that "there can be no doubt that in its inception warg Kumri cultivation began with a permit to clear the forest and to bring the cleared space into cultivation." That this is the correct view is also evident from the documentary evidence in this case. Exhibit XVIII, paragraph (8), says: "A register will be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each wargdar is allowed to cut Kumri" (see also paragraph 8 of the Government Order, dated 29th August 1883 in Exhibit XV). Exhibit XIV, paragraph 17, says: "In Bekal Táluk alone wargdar Kumri has not been abolished and the continuance of the existing system is recommended both by the Collector and by the Board. The practice stands on no better ground of right there than in North Kanara, but the reasons given for permitting its continuance are, etc." (see also Exhibit XV, paragraph 2, but allowed it to continue, etc., paragraph 3, the Kumri thus permitted, etc.', paragraph 9 'to be allowed to carry on annual Kumri cultivation etc.', 'is allowed the advantage which arises from the practice, etc.', 'one acre shall be allowed for every four annas of Kumri cist, etc.', paragraph 13 'to allow only one acre for every four annas of cist, etc', paragraph 15 'extent of Kumri formerly allowed in, etc.' paragraph 18 'why each wargdar should not be allowed etc.', paragraph 19 in permitting any amount of warg 'Kumri, etc). Exhibit XV, paragraph 5, general rule 3, says, "Kumri will be allowed at the rate of etc.; and paragraph 6 of the same document, in commenting on this rule, says. "In order to secure that only this amount is cut, permits are annually given, and the cultivation is annually measured up etc." (See also paragraph, the wargdars who cut under the permits, etc.'). In 28 Mad., 257 (F. B.) it was held that in order to show ownership as against the Government in forest and immemorial waste land it is necessary that there should be proof of the exercise, both, in the past and in the present, of acts of undoubted ownership, such for instance as, the granting of leases to tenants for cultivation, the cutting of valuable trees for sale and the like, and not such acts as the Government permits in what are admittedly Government forest and waste lands for the benefit of the adjacent cultivation (see at 285). And it was held, following the above principle that 'kumaki' and 'netticut' privileges, which are conceded to all wargdars for the better enjoyment of their warg lands adjacent to Government forest, do not by any means prove exclusive right as against the Government (see also pages 290 and 300). Though that particular case related only to 'kumaki' and 'netticut' privileges, it is also clear that 'kumri' right also stands absolutely on no higher footing as Their Lordships themselves point out at pages 270–271. So that even assuming that all the plaint kumris are entered in the gadi registers (vide exhibits F and L) as 'warg kumris,' it does not follow that it constitutes adverse possession as against the Government. Again, both the Subordinate Judge as well as the District Judge hold that possession even by the cultivation of kumri has not been shown to extend to more than fifty years prior to suit at the furthest. Only one witness speaks of even fifty years and all the rest do not go beyond 35 years. So that they hold that sixty years' possession by cultivation of kumris is not proved.

Another act of possession alleged is the making of elephant pits. But, as the District Judge points out, though there are isolated pits here and there, there is no evidence as to who made them, as to whether Government was aware of their existence as to when they were made, nor that they were even made more than sixty years before suit.

The next act of possession relied on is the building of paved wells. Here, again, only in one kumri were there four wells and none in others, and as the District Judge points out, there is no evidence as to who built them and when; and it appears from the evidence that the wells have become useless now, that no one used to take water from them and that some of the wells are fully and the rest partly filled up.

Kalams (drying yards) and sheds (used as houses) are found in some plots, but the District Judge says there is no evidence that plaintiff made them to the knowledge of Government more than sixty years ago and that, moreover, they are only the ordinary accompaniments of kumri cultivation.

There is a naga on one plot, but there is no evidence as to how it came into existence nor that plaintiff made it more than sixty years ago to the knowledge of the Government.

The District Judge holds that none of the above circumstances constitute adverse possession on the part of the plaintiff against the Government.

As to what is the nature of the acts or possession which constitute adverse possession, and that too in particular as against the Government, reference might be made to 3 Bom. 452 at pages 586, 789, 585, as well as to a few other cases. In 8 *Bom.* 452, West, J., says: "In the case of a private owner even, the allowance of acts which do not necessarily involve any denial of his ownership, or a grant from him, does not suffice to create an ownership against him; and the mere non-interference of the State, to which neglect is not to be imputed, is not to be accounted for, if it can be otherwise accounted for, on a presumption of a surrender of its ownership. Such a transaction must be evidenced by an undisguised and effective appropriation assented to or submitted to by some one having due authority, or else fortified by an equivalent law of prescription." (See page 586.) Again, "even though there had been no interference on the part of

the Revenue officers with the free use of the forest, yet that free use, without an exclusive appropriation, would not in itself constitute an exclusive right as against the public. The right arising from the State's eminent domain is not extinguished by its mere non-exercise; and its exercise was not called for until some public injury or inconvenience arose" (see page 739), and "there can be no grant, no acquiescence in possession, unless the essential elements of possession, a fixed, a definable, an exclusive occupation, exist, and are present to the perception of the parties" (see page 585). The above passages are referred to with approval and followed in 28 Mad. 257 (P.B.) (see pages 285-286). 9 *Mad.* 285, at 302 to 307, also discusses the nature of the acts or possession that constitute adverse possession. At pages 302-308, Their Lordships Turner, C.J., and Muttuswami Ayyar, J., say that in order that physical possession may generate ownership, "it is necessary that the possessor should hold the thing exclusively and for himself as owner" At page 303 they say: "When we speak of actual possession, we refer to the physical fact, and when we speak of adverse possession, we refer to the fact as in union with the intention to hold as owner." And then they distinguish between such acts of ownership and acts which are done in the exercise of easements (in which latter case the particular act is done with the belief that another is its owner and not with the intention to hold as owner). At page 302, they say: "By juridical possession we understand that a person stands in such relation to the particular thing that he has in fact dominion over it, and when he and those under whom he claims have in fact exercised this dominion from time immemorial or for the period fixed by the law of prescription, he becomes the legal owner of the thing, unless private ownership in it is forbidden by law and on that account is rendered legally impossible." At page 304 they say: "The enjoyment of any right of ownership over the soil, whether it be the cutting of timber or of turf, or the gathering of produce, is prima facie proof of the ownership of the soil, and when the District Judge found that there had been such an enjoyment of the forest as proved a title to the profits, he was logically bound to find a title established to soil, seeing that the enjoyment had been throughout accompanied with an assertion of such ownership." At page 306 they refer to 3 Bom. 452 which they say in substance decided that there could be no grant, no acquiescence in a possession, unless the essential elements of possession, a fixed, a definable boundary and an exclusive possession exist and are present to the perception of the parties and that the kumri cultivation proved in that case was so precarious and unequivocal that no grant could be presumed. And they say that such cases as that do not show "that no grant ought to be presumed when adverse possession had been proved for sixty years and when it has been during that period repeatedly and openly alleged and even at times acknowledged to have been exercised as owner." Our case is that there is no such adverse possession proved in this case in the sense defined above: *In* 15 *C.L.J.* 281, at 303, Their Lordships Mookerji and Carduff, JJ., say: "As ruled by Their Lordships of the Judicial Committee in 27 Cal. 943, in order to prove title to lands by adverse possession, the possession must be adequate in continuity, in publicity and in extent so as to indicate that it is possession adverse to the competitors. It may also be treated as settled as ruled by this court in 24 Cal. 256, 3 C L.J. 316, and 35 Cal. 961, that no presumption of possession can be made in favour of the adverse possessor, and his possession must be restricted to the land of which he has actual possession."

That the burden of proving positively adverse possession for the full statutory period lies heavily on the person setting up such adverse possession is evident not only from the case just cited, but also from 39 *Mad.* 617 (P.C.) at pages 630 to 631. In that case the High Court (whose decision was reversed by the Privy Council) held that: "Though the title was originally in the Crown, still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, i.e., within sixty years before the notification." The Judicial Committee disapprove of this statement of the law in the strongest possible terms. They say at page 631: "Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct, it would be open to the possessor for a year or a day to say: 'I am here: be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great spaces of jungle lands necessarily not under the supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession. The application of this elementary doctrine is singularly clear, for there is a double finding of fact, a finding not disputed even in the High Court, that no adverse or exclusive possession was proved before the year 1882. The case of the respondents must accordingly fail."

Again, the question whether the possession alleged is 'adverse' and whether, if it is adverse, such adverse possession has extended for the full statutory period must be considered to be a

question of fact, and hence the Judicial Committee should not interfere with the finding on this issue by the lower appellate court. In 15 *Mad.* 101 (P.C.), at page 108, Their Lordships say: "Whether there has been a persistent claim of right to a tract of land is, Their Lordships need hardly say, a question of fact. Such assertion being proved, all questions as to the amount of use and enjoyment of the tract by the claimants and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed are also, in the opinion of Their Lordships, pure questions of fact." They say that the District Judge in that case had found on the evidence that the claimant had all along exercised exclusive right of grazing cattle, cutting timber, etc., and that the High Court concurred with that finding. And at page 109 Their Lordships say: "Having regard to the character of the subjects in controversy, the exclusive possession which the zamindars are, by concurrent judgments, found to have enjoyed appears to them to have in no particular fallen short of proprietary possession." In the present case there are concurrent findings of three courts against such adverse possession. That the above question regarding adverse possession is one of fact is also evident from 39 *Mad.* 617 (P.C.) at page 630 (see the extract from the page cited before when discussing the binding character of a lower appellate court's findings of fact on the Judicial Committee). This probably is by itself sufficient to dispose of plaintiff's argument, if any, before the Privy Council on issue II, but in view of a possible argument by him that the lower court's finding on this point is due to a misapprehension of the law relating to kumri cultivation and the rights it gives to the person who carries on such cultivation, I have briefly dealt with the evidence also relating to the several acts of possession alleged to constitute the adverse possession.

There is again the further question whether, even if the evidence adduced does not show adverse possession for the requisite period, it is such as to rebut the Government ownership of these lands; and this question, though not strictly coming within issue II, might conveniently be considered here. I have to deal with it because Oldfield, J., says that the plaint includes this alternative case also and that 28 Mad. 257 (F.B.) authorizes it. It is a matter for argument before the Privy Council that once the presumptive ownership of the Government is established any other person who wants to show title to such lands has to show either that the Government has made an express grant to him, or that the circumstances and the evidence are such as to raise by implication the presumption of a lost grant, or that he has prescribed a title to them by adverse possession for the requisite period: that, in short, apart from the question of grant express or implied, there is no other method of showing title to them as against the Government except by proving adverse possession for the statutory period. It is true that in 28 Mad. 257 (F.B.), at page 270, it is said that the presumption of any Government ownership "may be rebutted by proof of private ownership in regard to any particular part of the forest", and that at page 286 it is said that the presumption is in favour of Government ownership of any immemorial waste lands "to which no private person can show a title by grant, or by such user and occupation as is inconsistent with the proprietary right of Government." But could it not be argued that it is unnecessary to construe these and other similar passages in the judgment to mean that there are other methods of showing title as against Government besides grant, express or implied, and prescription, and that if Their Lordships, on the other hand, meant to lay down that the Government ownership could be rebutted by the rival claimant showing that he has exercised acts of ownership (though they be acts of undoubted and exclusive ownership) say for five or ten years, then it could not be regarded to be a correct statement of the law. For if it be the law that a person showing acts of ownership on his part for less than the prescriptive period could succeed as against the Government, there is the same likelihood of a deception being practised on the Government and the Government being put to a negative proof as Their Lordships of the Privy Council apprehend in 39 *Mad.* 617 (P.C.) at page 631. (See the passage from this page extracted above). Their Lordships denounce in the strongest possible terms the statement of the law which makes such apprehensions possible, and though they were specifically dealing with the case of adverse possession, the principle should be equally applicable to this 'alternative case' also at least so far as this particular aspect of it is concerned. Nor does the fact that that case related to island arising from the sea make these remarks of the Judicial Committee inapplicable to the present case because, as they themselves expressly indicate at page 631 (see the passage extracted above), so far as India is considered, islands arising from the sea and great spaces of jungle lands stand on the same footing so far as the right of the Crown to them is concerned. Again, Their Lordships of the Privy Council in 39 Mad. 617 (P.C.) in further disapproving of the High Court's view as stated in the sentence, "Though the title was originally in the Crown . . . within sixty years before the notification" (see this sentence extracted before) say at page 633: "In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, Their Lordships' opinion is, as stated, that this is erroneous. But (2) with reference to the 'subsisting title', it appears to Their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that fact forms 'subsisting title'. And (3) it is no part of the obligation of the Crown to fortify their own fundamental right by any inquiry into possession or the acceptance of any onus on that subject."

If, however, it be held that such .... alternative case could in law be put forward, it is doubtful if the plaint in the present case contains it, though, of course, Oldfield, J., says it does. Paragraphs 6 and 8 of the plaint need only be construed together as pleading adverse possession, and this is how it was put forward before the Subordinate Judge as well as before the District Judge (see especially the Subordinate Judge's judgment, paragraph 3). At any rate, there is no issue asked for or framed as to this alternative case and no argument as to it was advanced either before the Subordinate Judge or before the District Judge. If, however, it also be held that paragraph 6 of the plaint contains this case, and that the plaintiff is entitled to rely on it for the first time before the High Court or the Privy Council, after all, the evidence in this case is not such as to rebut the presumption of Government ownership of these lands. For, as pointed out in 28 Mad. 257 (F.B.) itself at page 285, in order to rebut the presumption of such Government ownership, it is necessary that there should be proof of the exercise, both in the past and in the present, of acts of undoubted ownership such, for instance, as granting of leases to tenants for cultivation, the cutting of the more valuable timber trees for sale and the like. There is no evidence in the present case of any such acts. The only evidence in this case is of such acts as the Government allows to be done in what are admittedly Government forest and waste lands for the benefit of the adjacent wargdar, which acts, Their Lordships expressly point out, would not rebut the presumption of Government ownership.

Issue III.—Even assuming that all the plaint kumris are entered in the gadi registers (exhibits F and L) as warg kumris (which fact I don't think we could successfully deny), it does not follow that the Government admitted any proprietary title of any private individual to the said kumris. As stated above when considering Issue II, the whole question whether kumri cultivation could give a proprietary title to land was examined exhaustively in 3 Bom. 452 and was decided in the negative, and in 28 Mad. 257 (F.B.) Their Lordships approved and followed this Bombay decision and said that it is applicable to South Kanara also (see page 271). Again the entry of kumri assessment in a warg did not establish or show any right of *general ownership* of the wargdar in any tract of jungle over which, or over parts of which, kumri cultivation had been used to be carried on; and whatever the rights of wargdars paying kumri assessment might be in respect of jungles in which kumri cultivation might, for the time being, be carried on, the jungles themselves still belonged to the Government. (See 3 Bom. 452 at 500.) Also kumri right in one person may be quite consistent with the general ownership in the soil being in another; and if such general ownership be not in the plaintiff there can be no doubt that such ownership must be with the Government. (See 3 Bom. 452 at page 514.)

Again, it is clear from exhibit XVI that the distinction between the two sets of kumris was made only for fiscal or revenue purposes. From it it is clear that in the Government's opinion the rights of 'wargdar kumri' are in no way superior to those of the 'sirkar kumri,' and that the entry of certain kumris in a warg denoted nothing more than that the wargdar was also the temporary renter of certain jungle farms or privileges which the Sirkar was competent to modify or discontinue at will; and "it is solely as an act of grace that in the Bekal taluk the wargdar, whose warg includes the item, is in consequence of the more systematic nature of the cultivation still to be recognized as the party with whom Government have to clear for the realization of the assessment, which elsewhere will be made directly with the kumri ryots." In paragraph 8 of the Government Order, dated 23rd May 1860 (exhibit XIV), it is said: "The Board give their decided opinion against the validity of any claim to proprietary rights in forest, based on the entry of 'kumri sist' in the patta or the account of any estate. They regard it as simply a rent or form of the privilege of cutting kumri in the tract in question: the continuance of which must depend on the pleasure of the Government." Exhibit XV, after referring in paragraph 4 to the rights of wargdar kumris, viz., that a 'wargdar' whose 'warg' includes the item of kumri sist has, so far as other individuals are concerned, the exclusive right to carry on this cultivation within a defined area, etc., says in paragraph 6: "Anything more than the above privileges in connexion with warg kumri must be considered as altogether unauthorzied encroachments." In paragraph 2 of the Government Order, dated 29th August 1882, in exhibit XV, it is stated: "To survey and demarcate the lands in which kumri is now cut and to impose upon it an acreage rate of assessment which under the Board's proposal is to confer complete rights of dealing with the land and with the wood growing thereon would, in the opinion of His Excellency in Council, tend to compromise the right of Government to deal with the lands as may seem advisable hereafter and to create notions of proprietary right in the wargdars which does not in fact exist" and the Government Order proceeds to safeguard against such possible claim of right. Exhibit XV, paragraph 21, rule 4, says: "This kumri assessment will cover nothing but kumri rights. Wood removed for sale beyond the limits of the village will be subject to the payment of seigniorage under the Forest rules". This also shows that the wargdar has no proprietary rights in the land where the kumri cultivation is carried on. In 1860 after an exhaustive inquiry, it was decided by Government (Government Order, dated 23rd May 1860—exhibit XIV in this case) that warg kumris in Bekal taluk stood on no better ground of right than Sirkar kumris, that the distinction is made solely for fiscal or revenue purposes (see also exhibit XVI) and that the entry of 'kumri sist' (i.e., assessment for kumri cultivation) in the patta (or account) of an estate or warg gave no validity to a claim to proprietary right over the forest in which the 'kumri' was carried on or even over the spots which had been actually cultivated (see 28 Mad., 257 at page 271; see also

Sturrock's *South Kanara District Manual*, volume I, pages 123–124). As Mr. Justice Green points out in 3 Bom. 452 at page 483: "The phrase used of a jungle being 'included' in a warg seems to mean only this, that in respect of kumri cut in such jungle, kumri assessment is entered in certain wargs", and this is quite consistent with the literal interpretation of the word 'warg' which means an account (see also paragraph 5 of the Government Order, dated 23rd May 1860, in exhibit XIV). Thus, simply because the plaint kumris are registered as warg kumris, it does not follow that the Government admitted any proprietary title of the plaintiff in them, nor is the Government estopped from contending that they still belong to it and not to the plaintiff. It might also be noted that this issue was not even pressed before the District Judge when he heard the case after being sent down by the High Court.

Issue V.—It may be that the plaintiff is not bound to give the boundaries of the plaint kumris if they can be sufficiently identified by survey and subdivision numbers or by names or numbers given in the gadi register. But as the District Judge points out, it is not possible to identify them with reference to these particulars. Admittedly, in respect of items 8 and 10, the survey numbers given in the plaint schedule are not correct and they have not been corrected up till now (see Subordinate Judge's judgment, paragraph 13, and District Judge's judgment, paragraph 21). It was also admitted by plaintiff's vakil before the Subordinate Judge that the name of kumri 'kunhi kochi' in plaint item No. 1 is a mistake for 'bellandakodlu', and no attempt has been made to rectify the mistake. As the District Judge observes, some of the gadi register numbers contain more properties and the survey numbers given for items 7 and 9 are exchanged in the plan. Moreover, there is the concurrent finding by the Subordinate Judge, as well as by the District Judge (after the case was sent down), that the survey and subdivision numbers nor the gadi register numbers given in the plaint are sufficient to identify the plaint kumris, and this finding must be accepted as final and hence the finding on this issue also must be against the plaintiff.

As regards Issues VI and VII, I have no special remarks to offer except what is stated above in the general summary of the findings of the Subordinate Judge and of the District Judge.